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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 INGRID F.,

11 Plaintiff,

12 v.

13 COMMISSIONER OF SOCIAL  
14 SECURITY,

15 Defendant.  
16

CASE NO. 3:18-cv-5718 JRC

ORDER ON PLAINTIFF'S  
COMPLAINT

17 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local  
18 Magistrate Judge Rule MJR 13. *See also* Notice of Initial Assignment to a U.S. Magistrate Judge  
19 and Consent Form, Dkt. 1; Consent to Proceed Before a United States Magistrate Judge, Dkt. 2.  
20 This matter has been fully briefed. *See* Dkts. 14, 17, 18.

21 After considering and reviewing the record, the Court concludes that the ALJ did not err  
22 by determining that it was not necessary to consult a medical expert regarding whether or not  
23 plaintiff equaled a listing for her heart condition. The regulations afford the ALJ discretion in  
24

1 determining whether or not to consult a medical expert, and a prior district court decision did not  
2 order the ALJ to do so. The ALJ gave at least one clear and convincing reason for rejecting  
3 plaintiff's subjective complaints, noting that her heart condition improved with treatment.  
4 Finally, the ALJ's step four and step five findings are not inconsistent, because the ALJ properly  
5 relied on vocational expert testimony that plaintiff could not do her past work as a hand  
6 packager, but was capable of performing her past work as a cashier.

7 Accordingly, this matter is affirmed pursuant to sentence four of 42 U.S.C. § 405(g).

#### 8 9 PROCEDURAL HISTORY

10 Plaintiff's application for disability insurance benefits ("DIB") pursuant to 42 U.S.C. §  
11 423 (Title II) of the Social Security Act was denied initially and following reconsideration. *See*  
12 AR. 48, 56. Plaintiff's initial hearing was held in September, 2012, before Administrative Law  
13 Judge Cynthia Rosa ("the ALJ"), who denied plaintiff's claim. AR. 8, 23. The Appeals Council  
14 denied review of plaintiff's claim, and plaintiff subsequently appealed to the district court, who  
15 reversed and remanded plaintiff's claim. AR. 1, 874.

16 Plaintiff's second hearing was again held before ALJ Rosa on October 14, 2015. AR.  
17 812. On February 26, 2016, the ALJ issued a written decision in which the ALJ concluded that  
18 plaintiff was not disabled pursuant to the Social Security Act. AR.792.

19 On February 13, 2017, the Appeals Council denied plaintiff's request for review, making  
20 the written decision by the ALJ the final agency decision subject to judicial review. AR. 785-86;  
21 *see* 20 C.F.R. § 404.981. Plaintiff filed a complaint in this Court seeking judicial review of the  
22 ALJ's written decision in September 2018. Dkt. 1. Defendant filed the sealed administrative  
23 record regarding this matter ("AR.") on December 17, 2018. Dkt. 10.

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2 BACKGROUND

3 Plaintiff, Ingrid F., was born in 1964 and was 43 years old on the alleged disability onset  
4 date of December 15, 2007. AR. 49. Plaintiff completed high school and has past work history  
5 as a cashier and in packaging. AR. 145-46. Plaintiff states that she stopped working because of  
6 her conditions. AR. 145.

7 Plaintiff filed her claim alleging heart problems and diabetes. AR. 49. According to the  
8 ALJ, plaintiff has at least the severe impairments of rheumatic mitral valve stenosis, status-post  
9 valvuloplasty, and mitral valve replacement. AR. 798.

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11 STANDARD OF REVIEW

12 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
13 social security benefits if the ALJ's findings are based on legal error or not supported by  
14 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th  
15 Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

16  
17 DISCUSSION

18 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Whether the ALJ  
19 reasonably determines that plaintiff's impairments did not meet or equal a listing; (2) Whether  
20 the ALJ reasonably evaluated plaintiff's subjective complaints; (3) Whether the ALJ's step four  
21 and five findings are consistent with one another. Dkt. 17, p. 1-2.

1           **I.       Whether the ALJ failed to consult a medical expert regarding plaintiff's**  
2                   **possible listing level condition.**

3           Plaintiff states that a prior decision by a District Court judge indicated that, on remand,  
4           the ALJ should have consulted a medical expert regarding plaintiff's heart condition. Dkt. 14, p.  
5           10. The 2015 remand order states in relevant part:

6                   Whether the ALJ seeks and considers opinions from medical experts on the nature  
7                   and severity of plaintiff's impairments and/or on whether her impairments equal  
8                   the requirements of one or more listings is up to her (see 20 C.F.R. § 404.1527  
                    and § 416.927), but the errors that plague the original decision suggests that such  
                    assistance may be necessary to understand the extent of plaintiff's impairments  
                    and the full panoply of her findings.

9           AR. 881. This statement clearly states that the decision to consult a medical expert is up to the  
10          ALJ. The citation to the relevant regulations indicates that the previous district court judge was  
11          deferring to the Administration's regulations.

12          The Ninth Circuit has held in an unpublished decision, that the ALJ is not required to  
13          consult a medical expert in making step-three determinations, including whether or not the  
14          impairment equals a listing. *Kruchek v. Barnhart*, 125 Fed. Appx. 825, 827 (9th Cir. 2005). The  
15          court cited the regulation which states that the ALJ "*may* also ask for and consider opinions from  
16          medical experts on . . . whether your impairment(s) equals the requirements" of a listed  
17          impairment, and noted that "*may*" indicates that the use of an expert is permissive rather than  
18          mandatory. *Kruchek*, 125 Fed. Appx. at 827 (quoting 20 C.F.R. § 404.1527(f)(2)(iii)).<sup>1</sup>

19          The Social Security Administration has issued an SSR which states that "longstanding  
20          policy requires that the judgment of a physician (or psychologist) designated by the  
21          Commissioner on the issue of equivalence on the evidence before the administrative law judge or  
22          the Appeals Council must be received into the record as expert opinion evidence and given

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24                   <sup>1</sup> The relevant regulation was revised, effective for claims filed on or after March 27, 2017. Plaintiff filed  
her claim in April 2011. *See* 20 C.F.R. § 404.1527; AR. 48.

1 appropriate weight.” SSR 96-6p, 1996 LEXIS 3 at \*8. This expert opinion evidence may be  
2 satisfied by the State agency medical consultant at the initial and reconsideration levels. *Id.* at \*9.  
3 However, an ALJ *must* obtain updated medical opinion evidence in the following circumstances:

- 4 • When no additional medical evidence is received, but *in the opinion of the*  
5 *administrative law judge* or the Appeals Council the symptoms, signs, and  
6 laboratory findings reported in the case record suggest that a judgment of  
7 equivalence may be reasonable; or
- 8 • When additional medical evidence is received that *in the opinion of the*  
9 *administrative law judge* or the Appeals Council may change the State agency  
10 medical or psychological consultant's finding that the impairment (s) is not  
11 equivalent in severity to any impairment in the Listing of Impairments.

12 *Id.* at \*9-10 (emphasis added). Although “Social Security Rulings do not have the force  
13 of law, [n]evertheless, they constitute Social Security Administration interpretations of the  
14 statute it administers and of its own regulations.” *See Quang Van Han v. Bowen*, 882 F.2d 1453,  
15 1457 (9th Cir. 1989) (citing *Paxton v. Sec. HHS*, 865 F.2d 1352, 1356 (9th Cir. 1988); *Paulson v.*  
16 *Bowen*, 836 F.2d 1249, 1252 n.2 (9th Cir. 1988)) (internal citation and footnote omitted). As  
17 stated by the Ninth Circuit, “we defer to Social Security Rulings unless they are plainly  
18 erroneous or inconsistent with the [Social Security] Act or regulations.” *Id.* (citing *Chevron USA,*  
19 *Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984); *Paxton*, 865 F.2d at 1356) (footnote omitted).

20 Here, the State agency medical consultant initially reviewed plaintiff’s medical records  
21 in June, 2011. AR. 53. The consultant considered whether plaintiff met the listing for 4.04  
22 Ischemic Heart Disease, and ultimately determined that plaintiff did not meet or equal the listing.  
23 AR. 51. Another consultant came to the same conclusion on reconsideration in October, 2011.  
24 AR. 60, 62. Additional records were submitted prior to plaintiff’s second hearing that relate back  
to the time period before September 30, 2012, plaintiff’s last insured date.

1 The ALJ considered these records and noted that although plaintiff continued to  
2 experience some cardiac symptoms, they did not meet or equal the criteria of the listed  
3 impairments. AR. 799. The ALJ listed cited to several places in the record that showed that  
4 plaintiff's symptoms were below listing level severity. AR. 799 ( demonstrated full range of  
5 motion and equal and normal pulses (citing AR. 698), diagnostic EKG revealed a normal sinus  
6 rhythm (AR. 698), remained in sinus rhythm after successful ablation for typical atrial flutter  
7 (citing AR. 770), denied chest pain, shortness of breath, or syncope (citing AR. 770, 1018,  
8 1054)). Therefore, the ALJ provided sufficient evidence to show that in her opinion, the new  
9 evidence would not change the consultant's finding that a listing was not equaled. SSR 96-6p,  
10 1996 LEXIS 3 at \*9-10.

11 The Ninth Circuit has held that "[a]n ALJ's duty to develop the record further is triggered  
12 only when there is ambiguous evidence or when the record is inadequate to allow for proper  
13 evaluation of the evidence." *Mayes v. Massanari*, 276 F.3d 453, 459-460 (9th Cir. 2001)(citing  
14 *Tonapetyan*, 242 F.3d at 1150); *see also* 20 C.F.R. §404.1519a(b); POMS DI: 22510.005. Here,  
15 plaintiff has not alleged that the evidence is ambiguous or inadequate, but states that "it takes an  
16 expert in cardiology to . . . render an opinion on whether [plaintiff] meets or equals a listing. The  
17 ALJ is no expert." Dkt. 14, p. 13. However, plaintiff cites to no authority to support her assertion  
18 that only a cardiologist can render an opinion regarding whether plaintiff meets or equals a  
19 listing. To the contrary, the regulations are clear that the ALJ has discretion in determining  
20 whether or not to call upon an expert. *Kruchek*, 125 Fed. Appx. at 827 (quoting 20 C.F.R. §  
21 404.1527(f)(2)(iii)); SSR 96-6p, 1996 LEXIS 3 at \*8-10.

22 Finally, the claimant bears the burden of proof regarding whether or not she "has an  
23 impairment that meets or equals the criteria of an impairment listed" in 20 C.F.R. pt. 404, subpt.  
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1 P, app. 1 (“the Listings”). *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005), *as modified to*  
2 *render a published opinion by* 2005 U.S. App. LEXIS 3756 (9th Cir. 2005). A claimant must  
3 demonstrate that she medically equals each of the individual criteria for the particular Listing by  
4 presenting “medical findings equal in severity to *all* the criteria for the one most similar listed  
5 impairment.” *Kennedy v. Colvin*, 738 F.3d 1172, 1176 (9th Cir. 2013) (citing *Sullivan v. Zebley*,  
6 493 U.S. 521, 531 (1990); 20 C.F.R. § 416.926(a)). A claimant cannot rely on overall functional  
7 impact, but must demonstrate that the impairment equals each criterion in the Listing. *Id.* “An  
8 ALJ is not required to discuss the combined effects of a claimant’s impairments or compare them  
9 to any listing in an equivalency determination, unless the claimant presents evidence in an effort  
10 to establish equivalence.” *Id.* (citing *Lewis v. Apfel*, 236 F.3d 503, 514 (9th Cir. 2001); *Marcia*  
11 *v. Sullivan*, 900 F.2d 172 (9th Cir. 1990)). The ALJ noted in her decision that plaintiff “did not  
12 allege that the severity of any impairment met or medically equaled the criteria of a listed  
13 impairment. . .” AR. 799. Plaintiff does not challenge this finding.

14 In sum, the ALJ properly exercised her discretion in determining not to seek medical  
15 expert advice.

## 16 **II. Whether the ALJ properly evaluated plaintiff’s subjective complaints.**

17 Plaintiff states that the ALJ erred by improperly rejecting plaintiff’s symptom testimony.  
18 If the medical evidence in the record is not conclusive, sole responsibility for resolving  
19 conflicting testimony and analyzing a claimant’s testimony regarding limitations lies with the  
20 ALJ. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1999) (citing *Waters v. Gardner*, 452  
21 F.2d 855, 858 n.7 (9th Cir. 1971) (*Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980)). An  
22 ALJ is not “required to believe every allegation of disabling pain” or other non-exertional  
23 impairment. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (citing 42 U.S.C. § 423(d)(5)(A))  
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1 (other citations and footnote omitted)). Even if a claimant “has an ailment reasonably expected to  
2 produce *some* pain; many medical conditions produce pain not severe enough to preclude gainful  
3 employment.” *Fair*, 885 F.2d at 603. If an ALJ rejects the testimony of a claimant once an  
4 underlying impairment has been established, the ALJ must support the rejection “by offering  
5 specific, clear and convincing reasons for doing so.” *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th  
6 Cir. 1996) (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.1993)).

7         Here, the ALJ discounted plaintiff’s testimony regarding the severity of her symptoms  
8 because her condition improved after surgery. AR. 800. The ALJ supported this determination  
9 with substantial evidence. *See* AR. 801 (doing well after surgical valve replacement in 2010  
10 (citing AR. 515), continued to experience atrial flutters in 2011 and was referred for ablation  
11 procedure (citing AR. 744-49), post-surgical electrocardiogram revealed normal sinus rhythm  
12 and normal left ventricular systolic function (citing 763), prosthetic valve well-seated and  
13 functioning normally (citing 763-64), recovered quickly from both surgeries, which successfully  
14 restored plaintiff’s valve function (citing AR. 535, 764)). Improvement from treatment is a clear  
15 and convincing reason to discount plaintiff’s symptom testimony. *See Warre v. Comm’r of the*  
16 *SSA*, 439 F.3d 1001, 1006 (9th Cir. 2006) (“Impairments that can be controlled effectively with  
17 medication are not disabling”).

18         The ALJ gave several other reasons for rejecting plaintiff’s symptom testimony that do  
19 not rise to the clear and convincing standard. However, the Ninth Circuit has noted that “several  
20 of our cases have held that an ALJ’s error was harmless where the ALJ provided one or more  
21 invalid reasons for disbelieving a claimant’s testimony, but also provided valid reasons that were  
22 supported by the record.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (citing *Stout v.*  
23 *Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th Cir. 2006) (collecting  
24



1 cases)). Therefore, the ALJ did not commit harmful error in rejecting plaintiff's symptom  
2 testimony.

3 **III. Whether the ALJ's step four and step five findings are consistent.**

4 Plaintiff alleges that the ALJ's finding that plaintiff cannot do past relevant work is not  
5 consistent with her step five findings and the RFC that states that plaintiff is capable of work at  
6 the light exertional level. The ALJ assessed plaintiff's RFC at the light exertional level. AR.  
7 799-800. At the hearing the vocational expert ("VE") found that plaintiff had past relevant work  
8 of both hand packager and cashier. AR. 834. The hand packager position has a medium  
9 exertional level, and the cashier position has a light exertional level. AR. 834. The ALJ only  
10 discussed the hand packager position in her written decision. AR. 802-03.

11 Plaintiff argues that the ALJ's determination that plaintiff cannot perform her past work  
12 means that plaintiff also cannot perform the job of cashier. She states that it must follow  
13 logically that if plaintiff cannot perform the past work as a cashier, then she cannot perform the  
14 other light jobs at step five. Dkt. 14, p. 17. This argument fails.

15 At the hearing, the VE testified that plaintiff could perform the work as a cashier. AR.  
16 836. Therefore, even if it were error for the ALJ not to discuss this job in the written decision at  
17 step four, the outcome would not change. *See Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir.  
18 2012). The VE testified that plaintiff could do her past work as a cashier, and also testified that  
19 there were other light jobs that plaintiff could perform. Plaintiff concedes that "[t]here is nothing  
20 in the RFC to distinguish this job from the three light level jobs identified by the VE at the  
21 hearing. . ." Dkt. 14, p. 17. There is nothing in the record to indicate that the ALJ intended to  
22 imply that plaintiff was not capable of performing her past work as a cashier. Indeed, the ALJ  
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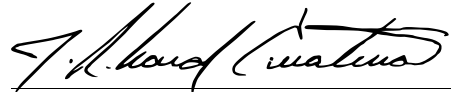
1 relied on the VE's testimony that plaintiff could perform the other light jobs the VE testified to.  
2 Therefore, there is no meaningful conflict between the ALJ's step four and step five findings.  
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4 CONCLUSION

5 Based on these reasons and the relevant record, the Court **ORDERS** that this matter be  
6 **AFFIRMED** pursuant to sentence four of 42 U.S.C. § 405(g).

7 **JUDGMENT** should be for **DEFENDANT** and the case should be closed.

8 Dated this 24th day of April, 2019.  
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12 J. Richard Creatura  
13 United States Magistrate Judge  
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